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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ABDUL ELAMIN RAHMAN,
A.K.A. SIDNEY GRANT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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52 pp

QUESTIONS PRESENTED FOR REVIEW

1. DID THE TRIAL COURT DENY PETITIONER HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY UNLAWFULLY SELECTING A JURY UNDER A PERCEIVED BATSON VIOLATION BY:

A. ERRONEOUSLY FINDING THAT PETITIONER'S EXERCISE OF PEREMPTORY CHALLENGES HAD THE "INVIDIOUS QUALITY" OF BEING RACIALLY MOTIVATED WHICH IS REQUIRED UNDER THE HOLDING OF BATSON V. KENTUCKY 476 U.S. 79, 106 S.Ct. 1712, 90L. Ed. 2d 69 (1986).

B. FAILING TO PROPERLY ACKNOWLEDGE PETITIONER'S RACE NEUTRAL EXPLANATIONS AND ERRONEOUSLY FINDING RACIAL PREJUDICE CONTRARY TO BATSON.

C. FINDING THAT PETITIONER ENGAGED IN PURPOSEFUL DISCRIMINATION SOLELY BECAUSE THE JURY HAD A DISPROPORTIONATE NUMBER OF AFRICAN-AMERICAN MEMBERS.

D. UNSEATING CERTAIN MEMBERS OF THE JURY AND ARBITRARILY REPLACING THEM. THE COURT'S CONDUCT VIOLATED THE EQUAL PROTECTION RIGHTS OF BOTH THE UNSEATED JURORS AS WELL AS THOSE VENIRE PERSONS WHO WERE ARBITRARILY NOT SELECTED.

2. DID THE TRIAL COURT, BY LIMITING MATERIAL CROSS-EXAMINATION, DENY PETITIONER HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS?

TABLE OF CONTENTS

Table of Cited Authorities iii
Opinion and Order Below 2
Jurisdiction 2
Constitutional Provision 2
Statement of Case 3
Reasons for Granting Certiorari 8
Conclusion 20
Appendix
Order of the Court of Appeals issued January 15, 1998 App. 1
Opinion of the Court of Special Appeals issued September 30, 1997 App. 2

TABLE OF CITED AUTHORITIES

Cases

Acquah v. State, 113 Md. App. 29, 686 A.2d 690 (1996)...10
Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931)...19
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977)...11
Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986)...8, 9, 11, 14
Booze v. State, 111 Md. App. 208, 681 A.2d 534 (1996)...10
Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 2d 549 (1970)...14
Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965)...18
Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed. 2d. 33 (1992)...14
Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991)....9, 10, 11
Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895)...18
Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 293 (1965)...18
Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed. 2d 834 (1995)...10
Swain v. State of Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965)...8
Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d (1975)...8

Statutes

28 U.S.C. §1257..... 2

Rules

Md. Rule 4-313..... 8

Constitutional Provisions

Fifth Amendment of the
United States Constitution..... 2, 5, 6, 7, 8, 9, 10, 11
Sixth Amendment of the
United States Constitution..... 2, 5, 6, 7, 8, 9, 10, 11, 14, 18
Fourteenth Amendment of the
United States Constitution..... 2, 5, 6, 7, 8, 9, 10, 11, 14, 18

NO _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ABDUL ELAMIN RAHMAN,
A.K.A. SIDNEY GRANT,
PETITIONER

v.

STATE OF MARYLAND
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

The Petitioner, Abdul Elamin Rahman, A.K.A. Sidney Grant, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of Maryland, dated January 15, 1998.

OPINION AND ORDER BELOW

The Order of the Maryland Court of Appeals denying Petitioner's Writ of Certiorari is reproduced at page one of the Appendix to the Petition. The unreported opinion of the Court of Special Appeals of Maryland filed on September 30, 1997, is reproduced at page two of the Appendix to this Petition.

JURISDICTION

On January 15, 1998, the Court of Appeals of Maryland denied Petitioner's Writ of Certiorari from the Court of Special Appeals of Maryland which affirmed the judgment of the Circuit Court of Baltimore City, convicting the Petitioner of assault, assault with intent to rob, and a handgun violation. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS

United States Constitution

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

Petitioner was charged under indictment no. 196032038 which charged Petitioner with assault with intent to murder and lesser included crimes. The State re-indicted Petitioner under indictment no. 196156015, charging Petitioner with robbery with a deadly weapon and lesser included crimes. The factual basis supporting each of these indictments was identical.

The case came before the court for trial on September 18, 1996. The court presented voir dire to a venire panel. Challenges for cause were made by the State and the Petitioner. The venire panel was then presented to the parties for alternating peremptory challenges of venire persons who were individually called before the court.

The process was begun with two challenges being made by Defense Counsel. Venire persons no. 1 and 3 were challenged at the outset of the proceedings. Both were white females. Next, Defense Counsel challenged venire persons no. 6 and number 8. Both of these venire persons were white males. Venire person no. 10, a black female, was seated in jury seat no. 1. The next member of the venire panel presented to the State and Petitioner was venire person no. 23. Venire person no. 23 was a black female. Petitioner exercised a peremptory challenge to strike venire person no. 23.

The next venire person to be challenged by the Petitioner was no. 25, a white male. Venire person no. 30 and venire person no. 31 were then seated from the panel. Venire person no. 32, a black female, was the next person to be challenged by Defense Counsel. Venire persons no. 35, 36, and 40 were then seated in juror seats 4, 5, and 6. Venire person no. 41, a white female, was then challenged by Defense Counsel. The next member of the venire panel was no. 43, a white female. This venire person was initially accepted by Petitioner.

The next person to be selected for the jury occupied seat no.

8. This seat is of particular significance since venire person no. 44, a black female, was accepted by both the State and Petitioner without objection.

The jury selection process continued, and venire persons no. 48, 54, 55 and 57 were placed in juror seats 9, 10, 11 and 12. At this point, a jury had been selected.

After the preliminary panel had been seated, the State then exercised a peremptory challenge to remove juror no. 1, a black female. Venire person no. 58 was selected to sit in juror seat no. 1.

Petitioner's counsel then challenged venire person no. 40, who was seated in juror seat no. 6. She was a white female. Venire person no. 61, a black female, was called for juror seat no. 6. She was then challenged by Petitioner. Two other venire persons, no. 63 and 66, both of whom were white, were also challenged by the Petitioner for juror seat no. 6. Venire person no. 69, a black female, was accepted as a replacement for juror no. 6.

The State then challenged a black male who was seated in juror seat no. 10. This position was filled by venire person no. 71, a white female. Finally, Defense Counsel challenged venire person no. 43 who had been seated in juror seat no. 7. This position was filled by venire person no. 74, a black male.

After Petitioner challenged juror no. 7, the State raised a Batson challenge. In support of its position, the State proffered the following argument: "Ten are white women were [sic] stricken, only three African American total and only four men total. There is a pattern with who [sic] they were replaced by [sic]." The State inaccurately portrayed the number of peremptory challenges exercised by Petitioner as well as the racial characteristics represented. Of importance is the inaccuracy in the State's count of stricken jurors. After the initial jury panel had been seated, the court tallied the Defense challenges as follows: three challenges for African American females (nos. 23, 32 and 45), four challenges for white females (nos. 1, 3, 41, 43), and three challenges for white

males (nos. 6, 8, and 25).

The court arbitrarily demanded a response from Defense counsel regarding the challenges to juror seat nos. 1, 6 and 7. Defense Counsel proffered various non-racial reasons, i.e. venire person no. 6 was a teacher and Petitioner did not want a teacher sitting on his jury. The trial judge placed great weight on the fact that venire person no. 6 did not respond to any questions during voir dire. However, Petitioner's Counsel proffered that after venire person no. 40 was seated in juror seat no. 6, she kept glaring at Petitioner. Petitioner exercised a peremptory challenge because she was glaring at him. The court erroneously stated that it did not believe that such conduct constituted a valid or a rational basis for the exercise of a peremptory challenge.

As to venire person no. 41, Petitioner exercised a peremptory challenge because she was young, single and obese. Petitioner proffered that these were valid non-race based reasons for the exercise of such a challenge. Venire person no. 41 was a clerk. Petitioner felt that venire person no. 41 would not carefully listen to the evidence in this case. The trial judge labeled Petitioner's reasons as "patently ridiculous".

As to venire person no. 43, Petitioner challenged her because she was a realtor who might have properties or show properties in the poorer section of town. Petitioner asserted that this may influence the way she received the evidence in the case. The court again found no rational basis for this challenge.

The judge followed no rational pattern in reseating jurors. He ordered venire person no. 6 to occupy juror seat no. 1; venire person no. 40 to occupy juror seat no. 6; venire person no. 41 to occupy juror seat no. 7 and venire person no. 43 to occupy juror seat no. 8. Petitioner objected to the judge's selection as being violative of his Fifth, Sixth and Fourteenth Amendment Rights.

In his arbitrary command to reseat jurors, the judge failed to inquire and reseat other venire persons who had been peremptorily

challenged. He reseated venire person no. 6 but disregarded reseating venire persons nos. 1, 3 and 8 who had been challenged for the same seat. This random reseating continued when the trial judge failed to reseat venire persons nos. 23, 25, 32, 41, 61, 63 and 66. None of these challenged persons were selected by the trial judge to sit on the jury.

The court indicated that Petitioner's counsel could exercise peremptory challenges for other venire persons that remained seated on the jury but not 6, 40, 41 and 43. Petitioner was told by the court he had several challenges remaining. Petitioner's counsel responded that he no longer understood how to use peremptory challenges. The court inquired as to whether Petitioner's counsel was accepting the panel as they are or whether Petitioner's counsel objected. Petitioner's counsel responded that he objected, thereby preserving the Constitutional questions raised herein.

Then Petitioner's counsel specifically requested that the court reseat venire person no. 44 who had occupied juror seat no. 8 and was unseated when the court arbitrarily seated venire person no. 43 in her place. The court denied this request. Venire person no. 44 was accepted as a juror by both the State and Petitioner. In replacing juror no. 8 the court arbitrarily struck venire person no. 44. Venire person no. 44 was not the subject of any challenge by the State. This violated the Petitioner's and venire person no. 44's respective Fifth, Sixth and Fourteenth Amendment Rights.

During the course of the trial Petitioner was denied his right to confront and reasonably cross-examine witnesses thereby violating Petitioner's Sixth Amendment Right. By this restriction, Petitioner was denied his right to effective assistance of counsel and his right to a fair trial.

The court limited cross-examination. Examples of the court's limitation of cross-examinations are: the detective's assessment of Moore's sobriety and conditions that impair an eyewitness; the fact that Mr. Moore was several hours late when the

trial reconvened after the weekend recess, and cross-examination to reveal that the incident was drug related thereby attacking the veracity of Thomas Moore, the alleged victim. This restrictive cross-examination denied Petitioner his Constitutional Right under the Sixth and Fourteenth Amendments.

The jury deliberated and found the Petitioner guilty of an assault with intent to rob, assault, and wearing, carrying or transporting a handgun. The court sentenced the Petitioner to three years for a handgun violation under count four of indictment number 19615605, and a concurrent sentence of three years for assault with intent to rob under the same indictment number, both of which were to run concurrently. Additionally, the court merged the conviction of assault into the assault with intent to rob conviction. These convictions should be overturned due to the fact that Petitioner was denied his Fifth, Sixth and Fourteenth Amendment Rights under the United States Constitution. These denials precluded Petitioner from receiving a fair trial and precluded various veniremen from exercising their Equal Protection Rights.

REASONS FOR GRANTING CERTIORARI

1A. THE TRIAL COURT DENIED PETITIONER HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY ERRONEOUSLY FINDING THAT PETITIONER'S EXERCISE OF PEREMPTORY CHALLENGES HAD THE "INVIDIOUS QUALITY" OF BEING RACIALLY MOTIVATED WHICH IS REQUIRED UNDER THE HOLDING OF BATSON V. KENTUCKY 476 U.S. 79, 106 S.Ct. 1712, 90L. ED. 2d 69 (1986).

Maryland Rule 4-313 provides for the exercise of peremptory challenges in criminal cases. Petitioner appropriately exercised his challenges in order to afford him a fair and impartial trial. "The function of the [a peremptory] challenge is . . . to eliminate extremes of partiality on both sides, [and] to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise." Swain v. State of Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d, 759, 772 (1965).

This court has never held that the Sixth Amendment requires that ". . . petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690, 703 (1975).

If the trial judge had properly applied the totality of relevant facts to Petitioner's peremptory challenges, he would have determined that Petitioner's challenges had no racially discriminatory purpose. In this case, merely because the State asserted that Petitioner struck a disproportionate number of Caucasian venire persons should not have triggered any inquiry by the court that the challenges were racially motivated. Indeed, if one examines the facts, there was at least one Caucasian sitting on the jury at the time the State raised its Batson challenge. That in itself, coupled with the fact that Petitioner used four of his eleven challenges to strike African-American venire

persons, defeats the State's assertion that Petitioner's challenges had a racially discriminatory purpose. Nevertheless, the court erroneously determined that there was evidence of racially discriminatory challenges.

1B. THE TRIAL COURT DENIED PETITIONER HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO PROPERLY ACKNOWLEDGE PETITIONER'S RACE NEUTRAL EXPLANATIONS AND ERRONEOUSLY FINDING RACIAL PREJUDICE CONTRARY TO BATSON.

Petitioner's race neutral explanation of his challenges rebutted the Batson objection made by the State. When evaluating the race neutrality of an attorney's explanation, ". . . a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991). Here, the trial court arbitrarily concluded that Petitioner's explanations masked race motivated intentions. When questioned by the court, Petitioner's Counsel asserted the reason for his challenging venire person no. 6. The reason asserted was that this venire person was a teacher. Petitioner, through counsel, stated, "My client didn't like the fact that he was a teacher. He made this choice." It must be inferred from this statement that Petitioner had a disagreeable experience with a teacher and felt that he could not be fairly judged by persons having this vocation. The court, with no basis in fact, concluded that Petitioner's neutral explanation was made on a racial basis. It is illogical to argue that a challenge based upon the teaching profession masks an invidiously racial challenge. To the contrary, a challenge of a teacher cannot be made on the basis of race. In contemporary society a teacher can be any race. Issues of poor teacher-student relations, poor scholastic performance and/or authoritarian classroom behavior by a teacher offer reasonable race neutral explanations for such a peremptory challenge.

Petitioner's counsel was questioned as to why he struck venire person no. 40. He stated she had been glaring at Petitioner after she was seated as juror no. 6. Maryland courts have concluded that a trial judge may accept hostility as a race neutral justification for a peremptory challenge. See Acquah v. State, 113 Md. App. 29, 686 A.2d 690 (1996) and Booze v. State, 111 Md. App. 208, 681 A.2d 534 (1996). In striking venire person no. 40, Petitioner had merely attempted to use a peremptory challenge in a manner permitted by the Maryland Rules. By taking notice of venire person no. 40's hostility and by responding with a peremptory strike, Petitioner was using the law as it was intended and as it is permitted. The reason for this challenge is an unrebutted facially neutral explanation. The court's rejection of Petitioner's explanation is clearly erroneous.

The trial court failed to evaluate the explanations offered by Petitioner's counsel in light of the proper standard established by law. A proffered explanation for challenges need not be persuasive nor must it be plausible. The burden is overcome, unless the striking party's explanation is inherently discriminatory. Purkett v. Elem., 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed. 2d 395 (1991). Here there is no indicia that striking venire person no. 40 was inherently discriminatory, therefore, the reasons proffered due to attitude and body language are both persuasive and plausibly sufficient to allow the strike. The court's rejection of Petitioner's explanation is clearly erroneous.

Race neutral explanations were given for the challenges of venire persons nos. 6 and 40. These explanations were wrongfully rejected by the trial court. The rejections were erroneous.

1C. THE TRIAL COURT DENIED PETITIONER HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY FINDING THAT PETITIONER ENGAGED IN PURPOSEFUL DISCRIMINATION SOLELY BECAUSE THE JURY HAD A

DISPROPORTIONATE NUMBER OF AFRICAN-AMERICAN MEMBERS.

A court that has been confronted with a Batson challenge must keep in mind the fundamental principle ". . . that official action will not be held unconstitutional solely because it results in a racially disproportionate impact." Hernandez v. New York, 500, U.S. 352, 359-360, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395, 406 (1991); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450, 464 (1977). Clearly, if an official's action will not be held unconstitutional solely because it results in racially disproportionate impact than an attorney's action on behalf of a defendant must be held to the same standard. Today Batson, supra, has been broadened to include the rights of the parties and the rights of individual jurors.

In this case Petitioner's counsel offered several race neutral explanations to the court. The race neutral explanations that were proffered to the court focused on occupation and demeanor. Neither of these explanations have a nexus to race. These are generic explanations for the challenges that were made. These explanations did not concern the race of the venire persons involved. In fact, following the unseating of juror no. 6, a challenge was made by Petitioner of venire person no. 61, an African-American female. Thus, if it was the intent of Petitioner to engage in purposeful racial discrimination, he would have chosen this venire person. The challenge of venire person no. 61 dispels any notion that Petitioner engaged in invidious discrimination during the jury selection process. Moreover, other African-Americans were challenged by Petitioner. Based on the record which shows peremptory challenges of African-Americans and race neutral substitutions it was clearly erroneous for the trial judge to find purposeful discrimination as a matter of law.

1D. IN SELECTING THE JURY THE TRIAL JUDGE DENIED PETITIONER HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WHEN HE UNSEATED CERTAIN

MEMBERS OF THE JURY AND ARBITRARILY REPLACED THEM. THE COURT'S CONDUCT VIOLATED THE EQUAL PROTECTION RIGHTS OF BOTH THE UNSEATED JURORS AS WELL AS THOSE VENIRE PERSONS WHO WERE ARBITRARILY NOT SELECTED.

Petitioner complains that the reseating of a properly challenged juror violated his right to Procedural Due Process. This violation denied him the right to select an impartial jury. It was the judge who arbitrarily reseated jurors who had been properly challenged. An example of the trial judge's arbitrary and capricious overreaching was the unseating of juror no. 8. The juror had been accepted by both the State and Petitioner. The unseating of this juror who was acceptable to both the State and Petitioner amounted to a violation of her Equal Protection Right to sit on a petit jury as well.

When the court reseated jurors it did so without any discernible consistent pattern. First, the court demanded that the venire person who had been placed in juror seat no. 1 be replaced by venire person no. 6. Venire person no. 6 was the third of four strikes that Petitioner's counsel used for juror seat no. 1. In this instance, the court disregarded Petitioner's challenge to venire persons 1, 3 and 8 who were not otherwise reseated. The court offered no criteria as to the reason for selecting venire person no. 6. By reseating only venire person no. 6, the court violated the Equal Protection Rights of venire persons 1, 3 and 8. These venire persons were never selected by the judge to be reseated. Petitioner's Constitutional right to select a fair and impartial jury was abridged.

The court employed a markedly different approach with regard to juror seat no. 6. In this case, the court reseated venire person no. 40 after she had been challenged and replaced by venire person no. 69. In the interim, three other people were challenged by Petitioner. Included among these three venire persons was venire person no. 61, an African-American female. Notably, none of those challenged venire persons nos. 61, 63 and 66 were ever reseated in

any other jury seat. Consequently, the Equal Protection Rights of these three venire persons were violated by the court's failure to seat them. Petitioner's Constitutional right to select a fair and impartial jury was also abridged.

Petitioner's counsel had originally challenged venire person no. 41 for juror seat no. 7. He then accepted the seating of venire person no. 43. After the initial jury was seated, Petitioner objected to venire person no. 43. The trial judge arbitrarily placed juror no. 41 back in juror seat no. 7. Without any rationale whatsoever, the trial judge placed venire person no. 43 in juror seat no. 8, thereby displacing and dismissing venire person 44 who occupied juror seat no. 8. Both the State and Petitioner agreed to place venire person no. 44 in juror set no. 8 without any challenges. The trial court has no right to select, displace and dismiss a venire person who is seated by agreement of the parties. The judge's conduct denied the Equal Protection Rights of venire person no. 44. Petitioner's Constitutional right to select a fair and impartial jury was also abridged.

The court never explained the reason for his action in selecting, displacing and dismissing venire person no. 44. Venire person no. 44 was an African-American female who had been accepted by both the State and Petitioner. She was replaced by venire person no. 43, a Caucasian female. Venire person no. 44 was the only juror that had been considered and selected for juror seat no. 8. The natural inference to be drawn from this matter is that the judge removed this woman because of the color of her skin. In an effort to rectify a perceived Batson violation, the trial court removed a person of color. This was not rectification of a perceived Baton violation, nor was it equitable. The trial court's removal of an African-American in order that there be space for a Caucasian juror was, itself, a Batson violation.

No discernible pattern can be ascertained from the court's action. Four venire persons had been challenged for the position of juror seat no. 6. None of these venire persons were placed in any

other seats on the jury. This is contrasted to the situation where both venire persons who were challenged for juror seat no. 7 were arbitrarily reseated on the jury. One was placed in juror seat no. 8 where there was no conflict, and thus no justification for any judicial tampering. Moreover, the court arbitrarily placed venire person no. 6 in juror seat no. 1. It should be noted that this venire person had never been seated. Some venire persons who had been challenged (e.g. venire person 1, 3, 8, 61, 63 and 66) by Petitioner's counsel were never reseated. Venire person no. 10 who had occupied juror seat no. 1 was not reseated nor was venire person no. 69 who had occupied juror seat no. 6. The method employed by the trial court was totally arbitrary.

The court is no less an agent of the State than either of the attorneys who argue before it. The essence of Batson, supra, was the protection of a juror's Equal Protection Rights. In this case, it is the trial court that is guilty of invidious discrimination. By objecting to the court's action, Petitioner's counsel appropriately preserved these Constitutional issues for appellate review. The excluded jurors' Equal Protection Rights are affected regardless of who exercised the race-based peremptory challenges which result in their removal. See Georgia v. McCollum, 505 U.S. 42, 48-49, 112 S.Ct. 2348, 2353-2354, 120 L.Ed.2d 33, 44-45 (1992) "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." Carter v. Jury Commission of Greene County, 396 U.S. 320, 329, 90 S.Ct. 518, 523, 24 L.Ed. 2d 549, 557 (1970).

The peremptory challenge is a device employed by attorneys to guarantee that an impartial tribunal will hear the evidence. By arbitrarily reseating jurors in their original seats and other seats, the trial judge does more than rectify any perceived Batson violation. The court acted like a party litigant and the jury was created according to its design. When the court selected the jury in this case the court made it impossible for Petitioner to exercise his guaranteed

right to select a fair and impartial jury.

2. DID THE TRIAL COURT, BY LIMITING MATERIAL CROSS-EXAMINATION DENY PETITIONER HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS?

The trial court, by limiting material cross-examination denied Petitioner his Sixth Amendment and Fourteenth Amendment Rights. The objective of Petitioner's cross-examination was to attack the credibility of the State's witnesses. Petitioner was unconstitutionally denied his right to cross-examine.

More specifically, the areas where Petitioner was denied the truth testing technique of cross-examination involved the following:

A. Moore's sobriety at the time of the alleged act as interpreted by Det. Keller.[1]

1

Q. Okay. You reviewed the offense report?

A. I reviewed the offense report when I first learned about this offense.

Q. And it is true, is it not, that on the offense report there are certain things that kind of stared out at you as a homicide investigator, are there not?

MS. STEWART: Objection.

THE COURT: Overruled.

BY MR. IAMELE:

Q. Certain things came out at you, did they not? not? —

A. Sure.

Q. And one of the things that came out at you was that Officer Ruppert, when he talked to Mr. Moore, noted that Mr. Moore had been drinking?

MS. STEWART: Objection.

THE COURT: Sustained.

* * * *

Q. Okay. And as an investigator, did you weigh whether or not this person who is giving information was capable of giving information or whether or not that person was under the influence of alcohol at the time?

MS. STEWART: Objection, Your Honor. Move to strike.

THE COURT: Sustained. Granted.

MR. IAMELE: I'm asking what he did. If he weighed that, if he made that decision.

B. Why complaining witness reported to the court several hours late after weekend recess to resume the trial?[2]

THE COURT: The objection is sustained.
MR. IAMELE: Thank you.

* * * *

Q. Detective Keller, how long have you been a police officer?
A. Twenty years.
Q. And have you written offense reports?
A. Yes.
Q. Have you used the initials in offense reports, "H.B.D."?
A. Yes.
Q. And when you use those initials, what did you mean, sir?
MS. STEWART: Objection.
THE COURT: Overruled.
THE WITNESS: Had been drinking.
BY MR. IAMELE:
Q. Now, H.B.D. means had been drinking?
A. Correct.
(Pause)
Q. And this case, did you take into account the initials H.B.D.?
MS. STEWART: Objection.
THE COURT: Sustained.

[2]

Q. By the way, today you were supposed to be here at ten o'clock, were you not?
MS. STEWART: Objection, Your Honor.
COURT: Sustained.
BY MR. IAMELE:
Q. Just so that the record is clear, you didn't get here until --
MS. STEWART: Objection, Your Honor.
THE COURT: Sustained.
MR. IAMELE: Very well, Your Honor.
BY MR. IAMELE:
Q Did you have a rough weekend?
MS. STEWART: Objection, Your Honor.
THE COURT: Sustained.
MS. STEWART: Move to strike.

C. Cross-examination regarding the incident being part of a drug transaction.[1]

THE COURT: Granted.

[1]

Q. I have one last question. After you got out of the hospital, were you interrogated or questioned by officers of the Drug Enforcement Administration regarding this offense?

MS. STEWART: Objection.

THE COURT: Sustained.

BY MR. IAMELE:

Q. Did you talk to police?

A. I talked to several police.

Q. You ever talk to any Federal police?

MS. STEWART: Objection.

THE COURT: Sustained.

BY MR. IAMELE:

Q. Can you name the police that you talked to?

MS. STEWART: Objection.

THE COURT: Sustained.

BY MR. IAMELE:

Q. You are telling this jury that this incident had nothing to with drugs; correct?

MS. STEWART: Objection, Your Honor.

THE COURT: Sustained.

MS. STEWART: I move to have that stricken.

THE COURT: Excuse me. It's stricken from the record.

MS. STEWART: May we approach, Your Honor?

THE COURT: Yes.

(Counsel and the defendant approached the bench and the following ensued.)

MS. STEWART: Your Honor, there's nothing about any type of drug activity that has been raised by any of the evidence and it appears that the defense is just raising it just to -- it's highly prejudicial to the victim in this matter. There's been no evidence whatsoever, and I'd ask for the Court to admonish counsel, unless there's evidence, that it not be raised. It's irrelevant to this issue.

MR. IAMELE: Judge, I will proffer to you that the Drug Enforcement Administration did talk to this young man and that this shooting,

about this incident, and I think it's –

THE COURT: That has not been raised on direct or redirect examination or cross-examination of this witness?

MR. IAMELE: But this goes to his credibility.

THE COURT: Has any of this been raised at this point?

MR. IAMELE: Yes, I think so, let me tell you why. I think that arguments can be made on direct and they also can be raised on the basis of inference?

THE COURT: What's the inference?

MR. IAMELE: Well, hear me out. He takes a car a hundred yards down the road and leaves it there. He goes into a bar, has conversations with people that he doesn't knows casually, on the basis of the conversation, they take van that's at this bar and they go up the street. You can't see into the van. He's got a pager on.

I think all of these things are classical arguments of this probably drug deal gone bad. I will also tell you, okay – and I know that this does not reign, but in an offhanded conversation with Detective Keller –

THE COURT: Keep your voice down, please.

MR. IAMELE: Okay – in an offhanded conversation with Detective Keller, I mentioned that to him, and he said, "It could very well have been."

THE COURT: The objection is sustained. The Court counsel, admonishes that unless you have something more than what you have presented, you will not be permitted to conduct your cross-examination of this witness in the manner that you have started.

Thank you.

MR. IAMELE: Let me respectfully take an exception to Your Honor's ruling, because I think that the indicia of a drug deal gone bad is clearly evident here. On the basis of what the State often proffers is suspicious activity and it cuts both ways. I'll just leave it at that.

THE COURT: I'll note your exception.

MR. IAMELE: Thank you. And I will not go further.

THE COURT: And you will not allow you to go further in the manner. At this juncture, the Court finds that there's no basis for this part of the examination.

MR. IAMELE: Thank you.

MS. STEWART: Thank you.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13L.Ed. 2d 293 (1965), this Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right ... made obligatory on the States by the Fourteenth Amendment." The question in this Petition for Writ of Certiorari is whether the trial court denied that fundamental right to Petitioner.

This court succinctly stated the importance of cross-examination when in Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965), the court quoted Mattox v. United States" . . . cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. 156 U.S. 237, 242-243"

In the present case the Petitioner was denied his fundamental right to cross-examination when Det. Keller was not allowed to respond whether he had taken into account the impairment of the complaining witness. The detective should not have been precluded from testifying to the inability of the complaining witness to identify Petitioner due to his intoxication. The jury, therefore, was denied evidence which showed that the complaining witness was not worthy of belief.

After a weekend recess the complaining witness, who was in the midst of testifying, failed to appear when the trial resumed on the following Monday. The State was forced to call Det. Keller out of turn while waiting for the complaining witness to appear. The complaining witness appeared several hours late. Counsel for the

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(Counsel and the defendant returned to the trial tables and the following ensued:)

MR. IAMELE: Judge, that concludes my cross-examination. Thank you, sir.

Petitioner attempted to demonstrate that the complaining witness was unreliable and therefore not worthy of belief. His tardiness suggested a lackadaisical or neglectful demeanor. Counsel for Petitioner should have been permitted to cross-examine the complaining witness to demonstrate to the jury that his tardiness underscored his unreliability which would have impeached his previous testimony.

Petitioner's counsel was precluded from inquiring about a Drug Enforcement Administration interview with the complaining witness. The trial court stopped this inquiry. A reasonable inference based on the totality of the facts of this case would have allowed the argument that the complaining witness was to be disbelieved because of his drug activity.

As was stated in Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." Petitioner was denied his fundamental right to a fair trial as a result of the trial judge's proscription of meaningful cross-examination.

CONCLUSION

Based upon the foregoing facts and argument, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Maryland courts.

Respectfully submitted,

Domenic R. Iamele
Levy & Iamele
Suite 2101
201 N. Charles St.
Baltimore, Maryland 21201

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ABDUL ELAMIN RAHMAN,
A.K.A. SIDNEY GRANT,
PETITIONER

v.

STATE OF MARYLAND
RESPONDENT

APPENDIX

TABLE OF CONTENTS

Order of the Court of Appeals issued January 15, 1998 App. 1

Opinion of the Court of Special Appeals issued September 30, 1997 App. 2

ABDUL ELAMIN RAHMAN a/k/a/ SIDNEY GRANT	* In the
	* Court of Appeals
	* of Maryland
	* Petition Docket No. 465
STATE OF MARYLAND	* September Term, 1997 (No. 1885, September
Term	1996, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

_____

Chief Judge

Date: Jan 15 1998

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1885

SEPTEMBER TERM, 1996

ABDUL ELAMIN RAHMAN
a/k/a SIDNEY GRANT

v.

STATE OF MARYLAND

Murphy, C.J.,
Kenney,
Byrnes,

JJ.

Opinion by Byrnes, J.

Filed: September 30, 1997

#196032038

A jury in Baltimore City convicted appellant Abdul Elamin Rahman, a/k/a Sidney Grant, of assault, assault with intent to rob, and wearing, carrying, and transporting a handgun. The trial court merged the assault conviction into the assault with intent to rob conviction and sentenced appellant to three years for assault with intent to rob and three years for the handgun violation, to run concurrently. Appellant presents five questions for review, which we restate as follows:

I. Did the trial court err in finding that appellant exercised his peremptory challenges to the jury for impermissible racial motivation?

II. Did the trial court err in the remedy it imposed for that violation?

III. Was appellant denied his right to a speedy trial?

IV. Was sufficient evidence adduced to support a guilty verdict on the handgun charge?

V. Did the trial court erroneously restrict appellant's cross-examinations of two prosecution witnesses?

Finding appellant's arguments on these issues to be without merit, we affirm the judgments below.

FACTS

This case arises out of a shooting that took place on December 19, 1993. That night, Thomas Moore was ejected from Partners, a Baltimore City nightclub. He went to the Harbor Inn, where he encountered a friend named Victorio Hinton, who introduced him to appellant. Moore told them about his experience at Partners. The three men then left the Harbor Inn, boarded a van, and drove to Partners. Moore waited outside while Hinton and appellant spoke to some people inside. The three men then got back in the van, ostensibly to return to the Harbor Inn. Appellant drove, Hinton sat in the front passenger seat, and Moore sat to the rear and between them.

Instead of returning to the Harbor Inn, appellant took a route

that he described as a short-cut but that Moore recognized to be an unnecessary detour. Hinton pulled out a gun, which he held in his lap, and suggested that they drive back to Partners and shoot it off in front of the club. Fearing that he would be blamed if they were to do so, Moore protested. Appellant then drove the van into a parking lot and brought it to a quick stop. Hinton jumped out, opened the sliding door next to Moore, and demanded that he exit and hand over his money and jewelry. When Moore got out of the van, Hinton put the gun to his head. Appellant emerged from the driver's side of the van, walked around to Moore, and rifled his back pockets while Hinton kept the gun trained at his head. Moore started to remove his gold necklace and then felt a forceful impact to the right side of his head. At first, he thought that Hinton had hit him with the gun. Moore fell to the ground, reached up, and felt a hole in the side of his head. Realizing that he had been shot and that his assailants had taken him for dead, he lay still. Appellant and Hinton drove off in the van.

Moore was hospitalized and diagnosed with a gunshot wound to the head. He underwent surgery to remove a bullet from his brain.

Almost two years later, on December 16, 1995, appellant was indicted for attempted murder, assault with intent to murder, assault, and wearing, carrying, and transporting a handgun. A second indictment arising out of the same events was handed up against appellant on June 21, 1996. That indictment contained counts for robbery with a deadly weapon, assault with intent to rob, use of a handgun in a crime of violence, and wearing, carrying, and transporting a handgun.

Additional facts will be recited as necessary.

DISCUSSION

I.

(i)

Appellant challenges the trial court's finding that he acted

with a racially impermissible purpose in exercising certain peremptory strikes, thereby violating the Equal Protection Clause, as interpreted in *Batson v. Kentucky*, 476 U.S. 79, 84 106 S. Ct. 1712, 1716, 90 L. Ed. 2d 69, 79 (1986). When the State interposed its *Batson* objection, eleven black jurors and one white juror were seated in the box. Appellant had exercised peremptory strikes against ten whites and three African-Americans. Of appellant's ten challenges of whites, two had been used to remove seated white jurors. After appellant struck those jurors, he challenged each venire member who was called as a potential replacement until both of the stricken white jurors had been replaced by African-Americans.

The Assistant State's Attorney argued that the pattern of peremptory challenges exercised by appellant evidenced a design to keep white venire members off of the jury. When the trial court asked appellant to explain his peremptory strikes, counsel responded that he had told his client to:

> "[T]ell me if he didn't like the looks of anyone that might look at him strangely when they were seated in the jury. He gave me those numbers, black and white, on the basis of what he felt. This is his jury. On the basis of his choice, I made my strikes."

The trial judge stated that he did not consider "looking strangely at a person" to be a satisfactory explanation for the pattern of strikes and directed appellant to explain each of his strikes, beginning with those that he had used against venire members who had not responded to any questions on voir dire.

As to the first such venire member, number 6, appellant's counsel stated that his client thought that he had looked at him "strangely" and that his client did not like the fact that he was a teacher. The trial court rejected that explanation, stating:

> "I don't think that the fact that an individual doesn't like his occupation or the way he looked is sufficient and we believe that there was a racial basis for the exclusion of that juror

[sp]."

When counsel commented further that his client did not like the way venire member 6 was dressed and "that's a valid rational basis," the trial judge remarked, "I do not believe that it is, sir. I find a racial motive for that selection."

According to appellant's counsel, venire member 40 "glared at" his client and seemed to have a "hostile reaction" to him. The trial judge rejected that explanation also, stating, "[w]e do not believe that is a valid rational basis to strike her from this jury."

Appellant's counsel explained his strike against venire member 41 by stating that she did not look to his client to be "marriage eligible;" that she was single and "somewhat obese;" and that she was a clerk who, by virtue of her occupation, might not listen to the evidence presented. The trial court found that those reasons were "patently ridiculous, and . . . do not present a rational, reasonable basis for that challenge."

Finally, the explanation for striking venire member 43, who was a realtor, was that she might "show property in the poorer sections of town and that might influence the way she receives evidence in this case."

Noting that the explanations offered by appellant for striking venire members 6, 40, 41, and 43 were not "rational" or "reasonable," the trial judge found that those peremptory strikes had been exercised for an impermissible racial purpose. He remedied the *Batson* violation by seating those four venire members on the jury and precluding appellant from using any of his remaining peremptory strikes against them.

(ii)

In *Gilchrist v. State*, 340 Md. 606, 625-26, 667 A.2d 876, 885-86 (1995), the Court of Appeals adopted the three-step process articulated by the Supreme Court in *Batson v. Kentucky* for determining whether peremptory challenges have been exercised in an impermissible discriminatory manner. First, the objecting party

must make a prima facie showing that the other party has exercised his strikes on a discriminatory basis. Next, the burden shifts to the party exercising the strikes to come forward with neutral, non-discriminatory explanations for them. Finally, the trial court must weigh and evaluate the information presented and determine whether the party raising the *Batson* objection has carried his burden of proving purposeful discrimination, by a preponderance of the evidence. 340 Md. 606, 625-26, 667 A.2d 885, 886 (1995); *Batson v. Kentucky*, 476 U.S. at 98, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88-89; *Hernandez v. New York*, 500 U.S. 352, 358, 114 L. Ed. 2d 395 (1991); *Jones v. State*, 343 Md. 584, 588, n.1, 683 A.2d 520, 522, n.1 (1996); *Chew v. State*, 71 Md. App. 681, 694-701, 527 A.2d 332, 338-342 (1987). In doing so, the trial court functions as a fact-finder. On review, we must give great deference to the lower court's findings and not disturb them unless they are found to be clearly erroneous. *Hernandez*, at 364-65; *Gilchrist*, at 627.

Appellant first complains that the trial court erred in finding that the State made a prima facie showing that his peremptory strikes were exercised with the intent to discriminate on the basis of race. "Whether the requisite prima facie showing has been made is the trial judge's call, which must be made in light of all of the relevant circumstances." *Mejia v. State*, 328 Md. 522, 533, 616 A. 2d 356 (1992). A prima facie showing of purposeful discrimination may be based upon a pattern of challenges against members of a racial group. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88; *Stanley v. State*, 313 Md. 50, 72-73, 542 A.2d 1267, 1278 (1988) (use of 80% of peremptory challenges against blacks held to have established a prima facie showing of discriminatory purpose). Here, appellant not only exercised 10 out of 13 peremptory strikes against white venire members but also exercised several of the 10 strikes so as to replace whites who had been seated in the jury box with African-Americans. Given this pattern of strikes and the racial composition of the seated panel that is produced, the trial court's

finding that the State made a prima facie showing of impermissible racial motivation on appellant's part was not clearly erroneous. Moreover, the preliminary issue of the sufficiency of the prima facie showing became moot after the trial court ruled on the ultimate issue of intentional discrimination. *Hernandez*, at 359; *Gilchrist*, at 628.

A prima facie showing of purposeful discrimination on the basis of race in the exercise of peremptory challenges must be countered by a neutral explanation for the strikes that is:

> . . .based on something other than the race of the juror . . .[T]he issue is the validity of the [proponent's] explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Hernandez, at 360; *Batson*, at 97-98. In this case, appellant offered explanations to the trial court for his peremptory challenges against venire members 6, 40,41 and 43 that were facially race-neutral.[1] Those reasons included strange or negative facial expressions; occupation; marital status; dress; and body size. As we remarked in *Ball v. Martin*, however, it would be most unusual for a party or for counsel to admit that a strike had been exercised for a discriminatory reason, even if it had been. 108 Md. App. 435, 456, 672 A.2d 143, 153 (1996). That is why step three in the *Batson* process entails an

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In his brief, appellant suggests that, by directing its specific inquiry of appellant to those challenges used against venire members who had not responded to any questions on voir dire, the court was ruling, by implication, that a strike exercised against any such venire member is impermissible. This is not the finding of the trial court, explicitly or implicitly. To the contrary, the trial judge appeared to be giving appellant the benefit of a presumption that any later stricken juror who had responded to a question during voir dire may have said something in that response to justify the strike. For example, even though the trial judge had denied as racially based appellant's challenge for cause to venire member three, during the *Batson* inquiry, he proceeded on the assumption that appellant's peremptory challenge against that venire member was justified, as that member had responded to certain questions on voir dire.

assessment whether the explanations offered for the strikes are pretexts for purposeful discrimination or are valid reasons that do not deny equal protection. *Gilchrist*, at 626, citing, *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995) ("At that stage, implausible or fantastic justifications may [and probably will] be found to be pretexts for purposeful discrimination.") If any one of the challenged strikes is found to have been exercised for a racially discriminatory reason, the rule in *Batson* will have been violated. *Stanley v. State*, at 80.

Relying upon our decision in *Acquah v. State*, 113 Md. App. 29, 686 A.2d 690(1996), appellant argues that, because his explanations for striking venire members 6 and 40 - that they were making strange and hostile faces at his client - were facially race neutral, the trial court erred in finding that he violated *Batson*. Appellant's reliance is misplaced. In *Acquah*, the African-American defendant raised a *Batson* objection after the State had exercised all of its peremptory strikes against blacks. Finding that the defendant had made a prima facie showing of discriminatory purpose, the trial court required the State to come forward with race neutral explanations. Among the reasons given for the strikes was negative body language on the part of certain members of the venire. The trial court accepted the State's explanation and denied the defendant's *Batson* objection. We affirmed.

Appellant improperly generalizes our disposition in *Acquah* to conclude that, whenever the facial expression or body language of a potential juror is offered to explain the use of a peremptory challenge, the strike must be upheld as having been made for a valid, non-discriminatory purpose. That reasoning overlooks step three of the *Batson* process and the critical fact-finding role of the trial court in that process. The trial judge's evaluation of the reasons offered to rebut a prima facie showing of discriminatory purpose includes an assessment of credibility: the court may find that an explanation for exercising a strike, while facially neutral, is not believable or that the

party who made the strike is not credible in his claim that the explanation for it was, in actuality, the reason why the strike was exercised as it was. The process is not completed when the proponent of the strike offers a facially neutral basis for it. Rather, it is completed only after the trial judge has determined, as a matter of fact, whether the objector's claim of discriminatory purpose has prevailed over the other party's explanation of neutral intent.

During jury selection, the trial judge is able to observe the prospective jurors for facial expressions, body language, and other non-verbal forms of communication that, by their nature, are not susceptible of capture in a written record. A venire member's demeanor is for the trial judge, acting as a fact finder, to assess. Here, the trial judge witnessed the proceedings from a position of neutrality and, on the basis of his personal observations, rejected appellant's claims of "strange looks" by venire member 6 and hostile facial expressions by venire member 40. Our review of the record reveals nothing from which to conclude that the trial judge's factual finding that these explanations were pretextual was clearly erroneous.

Nor did the trial court err in rejecting as valid, race-neutral explanations the occupations of certain of the prospective jurors. Appellant claimed that he exercised a peremptory challenge against venire member 41 in part because her employment as a clerk indicated to him that she would not pay attention to the evidence. Quite apart from the question whether there is any logical nexus between holding a possibly ministerial job and having the ability to pay attention to evidence presented during trial, appellant did not strike African-American panel members who likewise held ministerial jobs: a customer service worker and a "representative." Indeed, appellant did not strike an African-American female who was unemployed and had only completed eleventh grade, a choice that belied his contention that his only objective was to eliminate potential jurors who might lack the ability to concentrate on the evidence. Moreover, appellant's statement that his challenge against venire

member 6 was based partly upon his occupation as a teach was at odds with his stated purpose of selecting jurors who would pay attention and have the ability to appreciate the evidence. The purported reason for striking venire member 43 - that, as a realtor, she might have shown properties in the poorer areas of town - was sheer speculation and had no connection to any fact or issue in the case. Indeed, given that most of the poorest areas of Baltimore City are occupied primarily by African-Americans, appellant's explanation for striking venire member 43 was not only far-fetched and without factual basis but also carried a racial subtext.

Finally, we find no ground to disagree with the trial judge's determination that appellant's stated reasons for challenging venire member 41 - that she was obese and perceived by him as not "marriage eligible" - were "patently ridiculous," and, by inference, contrived and that appellant's objection to the clothing worn by venire member 6 was pretextual. The trial court's factual finding that appellant exercised peremptory strikes against four white venire members for a racially discriminatory purpose, in violation of the principles explained in *Batson v. Kentucky*, was sound and was not clearly erroneous.

II.

Appellant maintains that, even if the trial court correctly ruled that he violated *Batson*, it erred nevertheless in the remedy it imposed. We do not find any merit in this argument either.

In *Jones v. State*, 343 Md. 584, 683 A.2d 520 (1996), the Court of Appeals held that the remedy to be imposed for a *Batson* violation is "a matter addressed to the sound discretion of the trial court." Id., at 586. In so ruling, the Court discussed the potential benefits and harms to the parties and to the prospective jurors that may ensue from remedying a *Batson* violation by discharging the venire and beginning anew as well as those that may result from the remedial reseating of improperly stricken jurors. It concluded that the goal of striking a proper balance between the litigants' rights to a fair

trial before an impartial jury and the potential jurors' rights to participate in the jury process free of discrimination is best achieved by eschewing per se rules and delegating broad discretion to the trial judge to fashion a remedy that is suited to the facts and circumstances of the particular case. Id., at 601-02.

In *Jones*, the trial court remedied a *Batson* violation that had been found after twelve jurors had been seated by removing seated jurors and replacing them with jurors who had been stricken. In ruling that the remedy imposed by the trial court was a proper exercise of its discretion, the Court adopted our reasoning in *Jones v. State*, 105 Md. App. 257, 274, 659 A.2d. 361, 369 (1995):

> The guiding factor in this determination [of the appropriate remedy] should be the likelihood of the juror harboring any prejudice to the violating party as a result of being improperly excluded from the panel. For example, when a *Batson* challenge is made in the jury's presence and the violating party offers his non-discriminary reason for striking the juror in front of that juror, there is the risk that the juror will bear animosity toward the party who exercised the strike. When, on the other hand, counsel explains his reasons for striking a particular juror at a bench conference, and the circumstances otherwise do not indicate to the juror that he was struck for improper reasons, the likelihood of prejudice is not present or is minimal.

343 Md. at 603.

In this case, the judge informed counsel at the outset of jury selection, before voir dire, that, "[f] or the purposes of *Batson* issues, all stricken jurors will be seated in the courtroom until after the jury is impaneled." That process was followed and, as strikes were made, whether for cause or peremptorily, venire members were instructed to return to seats in the courtroom. Arguments about strikes were made at the bench, out of earshot of the array. Upon finding that appellant had violated *Batson* in exercising his peremptory

challenges against venire members 6, 40, 41 and 43, the trial court chose to remedy the violation by seating those four people on the jury; implementation of that remedy necessitated the removal of four of the twelve jurors who were seated when the *Batson* objection was made. The trial judge selected those seated jurors who would be removed by: 1) determining for each illegally challenged venire member the jury seat the venire member would have occupied had the illegal challenge not been made; 2) identifying the occupant of each such jury seat at the time that the *Batson* violation was raised; and 3) removing each such occupant (venire members 58, 69, 74, and 44).[2] Before implementing the remedy, the trial court explained it to counsel, at the bench. Just as the venire members had not been told the reasons for the strikes made by the attorneys, the removals and replacements of jurors to remedy the *Batson* violation were carried out without explanation.

Appellant asserts three claims of error with respect to the

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The court made the following specific findings:

But for the illegal challenge to venire member 6, venire member 10 would not have been seated as Juror No. One; as venire member 10 was later stricken by the State and replaced by venire member 58, venire member 58 was removed as Juror No. One and replaced by venire member 6.

Venire member 40 was initially seated as Juror No. Six. She was then stricken illegally and replaced by venire member 69. As venire member 40 would have remained seated as Juror No. Six but for the illegal strike, venire member 69 was removed as Juror No. Six and was replaced by venire member 40.

Venire member 41 would have been seated as Juror No. Six had she not been challenged illegally. The illegal challenge resulted in venire member 43 being seated as Juror No. 7 and then replaced, upon the exercise of another illegal strike, by venire member 74. On that basis, venire member 74 was removed as Juror No. Seven and was replaced by venire member 41.

If venire members 41 and 43 had not been illegally challenged, venire member 43 would have been seated as Juror No. Eight, instead of venire member 44. On that basis, venire member 44 was removed as Juror No. Eight and was replaced by venire member 43.

remedy imposed by the trial court. First, he contends that the trial court acted arbitrarily in selecting which jurors to remove. Second, he argues that the trial court abused its discretion and usurped the jury selection process by imposing a remedy that necessitated the removal of four seated jurors. Finally, appellant contends that the trial judge's selection of venire member 44 as Juror No. Eight to remove from the box was racially motivated and itself constituted a violation of the principles set forth in *Batson*. These arguments are unpersuasive.

One cannot read the trial judge's explanation of the remedy he imposed and reasonably conclude that he arbitrarily selected which jurors to remove. The trial judge carefully traced the placements of jurors in the box so as to determine which jurors had been seated as a result of appellant's illegal challenges and, in that way, determined which jurors to remove. The remedy was narrowly and specifically designed to undo the effects of appellant's illegal challenges and reconstitute the jury as it would have been but for the illegal strikes. The trial judge's methodology was the antithesis of "arbitrary": it was rational, principled, and objective.

Appellant's suggestion that the trial court acted arbitrarily by not removing additional seated jurors who, but for the defense challenges to venire members other than numbers 6, 40, 41, and 43, would not have reached the box, evidences a misunderstanding of the scope of the violation that the trial court found and the remedy that it imposed. The pattern of strikes on which the prosecution based its prima facie showing of purposeful racial discrimination included strikes that were made before and between the challenges to venire members 6, 40, 41, and 43. Although the trial judge rejected appellant's global explanation of the pattern and required that he explain the challenges made against particular venire members, he gave appellant the benefit of the doubt on certain stricken venire members who had responded to questions on voir dire. The *Batson* violation that the trial court found related only to the challenges used

against venire members 6, 40, 41, and 43 and not to all of the venire members against whom appellant had exercised strikes. Given the parameters of the violation, it was not necessary for the trial judge to remove jurors whose placements resulted from the overall pattern of strikes exercised by appellant but not from the four challenges on which the finding of a violation rested.

Common sense dictates that, if a *Batson* violation is found after twelve jurors have been seated, a remedy that calls for reseating of illegally stricken jurors will necessitate the removal of an equal number of seated jurors. "Unless a party can demonstrate how he or she has been prejudiced, that 'party cannot complain that the seating of an improperly challenged juror violates his or her right to an impartial jury.'" *Jones*, at 604. Just as in *Jones*, the trial court in this case conducted the *Batson* inquiry at the bench, out of the hearing of the venire. None of the potential jurors - including those who had been stricken by appellant - knew the reasons for the strikes that had been made by either party or the reasons why some of the people who were stricken later were returned to the box. Nor were the potential jurors told that any strikes had been exercised improperly or properly. The only possible basis for a claim of prejudice by appellant is that the jurors who were reseated by the trial court would have known that they had been stricken by the defense previously. The Court in *Jones* rejected this very argument, stating:

> . . .prejudice, rather than speculation, must be shown. Something more than knowledge of who attempted to exclude the juror is thus required.

343 Md. at 604. We reject this argument also; the trial judge's decision to reseat the four illegally stricken venire members was within his sound discretion and did not prejudice appellant.

Finally, there is no merit to appellant's argument that the trial judge's removal of venire member 44 as Juror No. Eight itself constituted a violation of *Batson*. The racial composition of the seated jury at the time of the *Batson* objection - eleven African

Americans and one white - was a consequence of appellant's improper exercise of certain peremptory strikes for a racially discriminatory purpose. Had those strikes not been exercised illegally, four whites would have been seated on the jury and four African-Americans, including venire member 44, would not have been seated on the jury. In imposing its remedy, the trial judge was not arbitrarily devising a new racial composition for the jury; rather, he was returning the jury to the composition it would have been had it not been altered by appellant's illegal strikes. The trial judge did not remove venire member 44 from the jury panel because she was African-American. He removed her because she would not have been seated on the jury but for appellant's illegal challenges of venire members 41 and 43.

III.

Appellant argues next that his conviction should be reversed because he was denied his right to a speedy trial.

On March 18, 1996, appellant was arraigned on indictment No. 196032038 and counsel entered his appearance. Soon thereafter, the State requested a postponement of the May 24, 1996 trial date, on the ground that it was attempting to negotiate a plea with Hinton that would involve his testifying against appellant. Appellant opposed the request. The administrative judge found that the State had shown good cause, and granted the postponement. The trial date was reset for July 9, 1996.[3]

On July 9, 1996, the prosecution once again requested a postponement, which again was opposed. The Assistant State's

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As explained above, a second indictment, number 196156015, was handed up on June 21, 1996. The counts in both indictments were prosecuted simultaneously. Appellant argued below that the State violated his right to a speedy trial in its timing of the second indictment. He makes no such argument on appeal.

Appellant was convicted on the handgun violation count in the first indictment. His other convictions were on counts set forth in the second indictment.

Attorney provided two reasons to support her request: 1) that her primary witness, Baltimore City Homicide Detective Scott Keller, was unavailable to testify because he was out of town and 2) that she was in trial in another case. The administrative judge found that these reasons, and the unavailability of the assigned trial judge due to a pending trial, constituted good cause for a postponement.

Appellant's case was assigned a new trial date of September 18, 1996, which fell 183 days after the date on which he had been arraigned and his counsel had entered his appearance. Thereafter, appellant moved to dismiss, contending that he had not been afforded a speedy trial. The trial judge denied the motion, finding that the prosecution had demonstrated good cause for postponement of the case beyond 180 days and appellant had not demonstrated a violation of his constitutional right to a speedy trial under the factors enumerated in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

(i)

Under *Md. Code Ann.*, Art. 27, § 591 (1996 Repl. Vol.) and Maryland Rule 4-271, a criminal defendant must be tried within 180 days after the earlier of his initial appearance or his counsel's entry of appearance before the circuit court. The 180 day time limit, known as the *Hicks* rule, see *State v. Hicks*, 285 Md. 310, 403 A.2d 356 (1979), may be extended by the county administrative judge upon a showing of good cause. Md. Rule 4-271(a)(1). A case may be dismissed for running afoul of the *Hicks* rule if good cause did not exist for the postponement that carried the trial beyond the 180 deadline (the "critical postponement," see, *State v. Frazier*, 298 Md. 422, 428, 470 A.2d 1269, 1272 (1984)) or if there was an inordinate delay between the time of the good cause postponement and the trial date. *State v. Parker*, 338 Md. 203, 209-10, 657 A.2d 1158 (1995); *State v. Cook*, 322 Md. 93, 97-98, 585 A.2d 833, 835 (1991); *Rosenbach v. State*, 314 Md. 473, 480, 551 A.2d 460, 463 (1989).

In assessing the propriety of a finding of good cause to

extend a trial date beyond the 180 day limit, we must extend deference to the judgment of the lower court and we "shall not find an absence of good cause unless the [appellant] meets the burden of demonstrating either a clear abuse of discretion or a lack of good cause as a matter of law." *Frazier*, at 454; 470 A. 2d at 1286. A trial court's determination of good cause is discretionary and "carries a presumption of validity." *State v. Green*, 54 Md. App. 260, 266, 458 A.2d 487 (1983), *affirmed*, 299 Md. 72, 472 A. 2d 472 (1984).

The parties to this case agree that the *Hicks* rule started to run on March 18, 1996 and that the critical postponement occurred on July 9, 1996, when the case was carried over to a trial date that was 183 days after appellant's *Hicks* date. Appellant contends that, because Detective Keller was not the only homicide detective who investigated the case and because the other trial in which the Assistant State's Attorney was involved did not go forward that day, the administrative judge erred in finding good cause for a postponement of the July 9, 1996 trial date.

Detective Keller was the lead investigating officer in the case; he handled it from the beginning, overseeing the work performed by other officers, including another homicide detective. Participation by a second homicide detective in the investigation and that detective's apparent availability to testify could have eliminated Detective Keller's lack of availability as a basis for a good cause postponement if appellant had demonstrated that the second homicide detective's role in the investigation had been con-extensive with that of Detective Keller and, therefore, that his testimony was interchangeable with that of Detective Keller. Appellant presented no such evidence.

The other trial in which the Assistant State's Attorney was involved on the morning of July 9, 1996 was resolved by a plea agreement that afternoon. Appellant maintains that, because the prosecutor became available on the afternoon of July 9, good cause did not exist to postpone his case on the morning of July 9. This

argument ignores the fact that the prosecutor did not know in the morning that her trial would end that day. Certainly, appellant presented no evidence of the sort. The administrative judge granted the postponement on the basis of the circumstances that existed at the time of the postponement hearing; that is all that can be reasonably expected. In determining whether to postpone a trial date, a trial judge is not obligated to speculate about events that might or might not occur in the future, and about which there is no evidence.

Finally, while appellant posits that the ten week postponement from July 9, 1996 to September 18, 1996, all but three days of which fell within 180 days of appellant's *Hicks* date, constituted an "inordinate delay," which mandated dismissal, he does not present any argument explaining why this is so. Thus, our consideration is limited to a rote calculation of the number of days that passed between the July 9, 1996 continuance and the September 18, 1996 trial date. An arithmetic analysis is not helpful to appellant. As the Court of Appeals explained in *State v. Parker*, when it determined that there was no need to remand that case for consideration whether a three month postponement constituted "inordinate delay," it has upheld longer delays in other cases. 338 Md. at 211. *See Rosenbach, supra* (78 day delay is not inordinate); *State v. Bonev*, 299 Md. 79, 472 A.2d 476 (1984) (delay of more than three months is not a clear abuse of discretion); *State v. Frazier, supra* (three to four month delay is not inordinate). We find that the 71 day delay between the last postponed trial date and the day appellant's case was tried was not inordinate, under the standards established by the Court of Appeals.

There was good cause for the July 9, 1996 postponement of the trial date and there was no inordinate delay in rescheduling the trial for September 18, 1996. Accordingly, there was no violation of Section 591 of the Criminal Code or Maryland Rule 4-271.

(ii)

There are four factors that bear on the question whether a

criminal defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution has been violated: the length of the delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 3 L. Ed. 2d 101, (1972); *Wilson v. State*, 281 Md. 640, 644, 382 A.2d 1053, 1056 (1978); *Jones v. State*, 279 Md. 1, 6, 367 A.2d 1, 5 (1976), *cert. denied*, 431 U.S. 916 (1977). The "length of delay" factor presents a threshold issue: "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, at 530. Thus, if the length of delay is not of "constitutional dimension," the court may determine that the defendant's right to a speedy trial has not been violated without analyzing the other factors. *Wilson*, at 651; *Tapscott v. State*, 106 Md. 109, 125, 664 A. 2d 42, 50 (1995).

In this case, the length of time from the date of arraignment to trial was six months and three days. At most, there was a four month delay in bringing appellant to trial, from May 24, 1996 until September 18, 1996. This period of delay, especially in a serious felony case, falls far short of delays that the Court of Appeals has deemed "presumptively prejudicial" in the past and is not of constitutional dimension. *See Jones v. State, supra* (delay of two years, five months between arrest and trial implicates Sixth Amendment rights); *Epps v. State*, 276 Md. 96, 345 A.2d 62 (1975) (delay of one year, 14 days between arrest and trial "presumptively prejudicial"). Appellant's constitutional right to a speedy trial was not abridged.

IV.

Appellant asserts that the evidence at trial was not sufficient to sustain his conviction for wearing, carrying, and transporting a handgun. On review, we must assess "'whether, after viewing the evidence in the light most favorable to the prosection, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.'" *Tichnell v. State*, 287 Md. 695, 717, 415 A.2d 830, 842 (1980), *quoting, Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979).

Md. Code Ann., Article 27, § 36B(b) (1996 Repl. Vol.) provides:

> *Unlawful wearing, carrying, or transporting of handguns; penalties.*--Any person who shall wear, carry or transport any handgun, whether concealed or open, upon or about his person. . . shall be guilty of a misdemeanor; and it shall be a rebuttable presumption that the person is knowingly transporting the handgun[.]

Section 36F defines the term "handgun" to include "any pistol, revolver, or other firearm capable of being concealed on the person [. . .] except it does not include a shotgun, rifle or antique firearm . . ."

Appellant's contention that there was no evidence showing that he personally was wearing, carrying, or transporting a handgun is accurate but nevertheless irrelevant. He was convicted on the handgun violation as an aider and abettor, not as a principal. Likewise, appellant's second argument, that there was not sufficient evidence from which the jury cold conclude that the gun in Hinton's possession was a "handgun," is not persuasive. In *Howell v. State*, the Court of Appeals held that, to be a "handgun" within the meaning of Article 27, § 36B(b), a weapon "must be a firearm or it must be readily or easily converted into a firearm" and that "to be a firearm [the weapon] must propel a missile by gunpowder or some such similar explosive. . ." 278 Md. 389, 396, 364 A.2d 797, 801 (1976). Circumstantial evidence is competent to prove, beyond a reasonable doubt, possession of an operable firearm. *Mangum v. State*, 342 Md. 392, 676 A.2d 392 (1996).

Viewing the evidence in the light most favorable to the prosecution, the jury was entitled to find that the following events

took place. Hinton was holding a gun in his lap as appellant was driving Moore and Hinton in the van. As he held the gun, Hinton suggested that he shoot it off in front of Partners. When Hinton ordered Moore out of the van and demanded his valuables, Hinton stood facing Moore, holding the gun and pointing it at the area of Moore's head around his right eye. Moore pleaded with Hinton not to shoot him. Moore was trying to hand over his jewelry when he felt an impact to his head and fell to the ground. As he was lying on the ground, he reached up and felt a hole in his head, by his right eye. He realized at that moment that he had been shot.

From the size of the gun in Hinton's lap, Hinton's threat to fire the gun in front of Partners, Hinton's stance as he held the gun to Moore's head, Moore's fear as Hinton held the gun to his head, the impact that Moore sustained to his head, and the hole that he felt in the side of his head after the impact, a reasonable jury could conclude, beyond a reasonable doubt, that the gun in question was an operable firearm and that it was not a shotgun, rifle, or antique firearm, as those terms are defined in Section 36F.[4] Even though

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[4] Section 36F provides the following definitions:

"*Antique firearm*. - 'Antique firearm' means: (1) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and (2) Any replica of any firearm described in paragraph (1) of this subsection if any such replica: (i) Is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) Uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.:

"*Rifle*. - 'Rifle' means a weapon designed [. . .] and intended to be fired from the shoulder and designed [. . .] to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger."

"*Shotgun*. - 'Shotgun' means a weapon designed [. . .] to be fired from the shoulder and designed [. . .] to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shots or a single projectile for

Moore did not see Hinton fire the gun and thought, at first, that Hinton had hit him with it, his discovery, after the impact, of a hole in his head at the precise spot that Hinton had pointed the gun was the ultimate circumstantial evidence to show that the gun was operable.

V.

Finally, appellant contends that the trial court infringed upon his constitutional rights to confrontation and a fair trial by improperly limiting his cross-examinations of Moore and Detective Keller. In his brief, appellant references by transcript page questions to which the trial court sustained objections; however, he does not present any argument as to why or how the exclusions from evidence of the answers to those questions prejudiced him. Moreover, with one exception, appellant did not proffer to the trial court the substance of the testimony that would have come into evidence had the objections not been sustained. As the Court of Appeals explained in *Mack v. State*:

> [T]he question of whether the exclusion of evidence is erroneous and constitutes prejudicial error is not properly preserved for appellate review unless there has been a formal proffer of what the contents and relevance of the excluded testimony would have been.

300 Md. 583, 603, 479 A.2d 1344, 1354 (1984); *Purohit v. State*, 99 Md. App. 566, 576-77, 638 A.2d 1206, 1211 (1994). Without a proffer of testimony, we do not have the information necessary to determine whether the trial court abused its discretion in sustaining the objections to appellant's questions. The propriety of those rulings was not preserved for appeal.

Appellant posed the following question to Moore on re-cross: "After you got out of the hospital, were you interrogated or questioned by officers of the Drug Enforcement Administration

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each single pull of the trigger."

regarding this offense?" The State's objection to this question was sustained. At the bench, appellant's counsel proffered that the DEA did speak to Moore. Counsel argued that this question and others that he had asked in follow up (to which objections had been made and sustained and for which there were no proffers) were designed to elicit testimony that would show that the shooting was "probably [a] drug deal gone bad." After the proffer, the trial court commented that the line of questioning was not in response to facts adduced on direct and that appellant's proffer did not provide a sufficient basis on which to permit appellant to embark on inquiries concerning whether the shooting arose out of a drug transaction.

Even assuming that Moore had been questioned by the DEA about the December 19, 1993 shooting and that he would have acknowledged that in responding to appellant's question, appellant offered no proof as to the nature of Moore's communication with the DEA. Moore may well have told the DEA that the shooting had nothing whatsoever to do with drugs. If so, Moore's testimony on the issue would have had no probative value and would have introduced the highly prejudicial and factually unsupported element of drug dealing into the case.

As important as a defendant's right to cross-examine witnesses is, it is not without limitations. The trial court is vested with discretion to reasonably limit the scope of cross-examination to prevent, among other things, harassment, confusion of issues, prejudice, and discovery of irrelevant information. *Grandison v. State*, 341 Md. 175, 206, 670 A.2d 398, 413 (1995); *Lyba v. State*, 321 Md. 564, 570, 583 A.2d 1033, 1036 (1991), *quoting*, *Smallwood v. State*, 320 Md. 300, 307, 577 A.2d 356, 359 (1990). On appeal, we will not reverse a trial court's decision to limit cross-examination unless it constituted an abuse of discretion. *Grandison*, at 206.

In this case, appellant was attempting to impeach the State's primary witness by accusing him, through a strategic line of

questions of drug dealing. The trial judge correctly determined that there was no reasonable basis for an inquiry into whether the shooting was drug related and that the question that appellant posed to Moore about the DEA was the first step in such an inquiry. The trial judge did not abuse his discretion by prohibiting appellant from asking Moore a question about drug dealing that was without evidentiary foundation and probative value and was highly prejudicial.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.